



**AM v FW & 2 others (Civil Suit 145 of 2019)
[2023] KEHC 20726 (KLR) (Civ) (25 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20726 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL SUIT 145 OF 2019**

**JN MULWA, J
JULY 25, 2023**

BETWEEN

AM PLAINTIFF

AND

FW 1ST DEFENDANT

ABRAHAM MUTAI 2ND DEFENDANT

CYPRIAN NYAKUNDI 3RD DEFENDANT

JUDGMENT

1. By a Plaint dated 8/7/2019, the Plaintiff filed the instant suit against the Defendants seeking orders that:
 - a. A written apology and a retraction of alleged defamatory publications.
 - b. General damages for libel.
 - c. Aggravated and/or exemplary damages.
 - d. Interest on (b) and (c) above at court rates from the date of filing suit until payment in full.
 - e. Costs of the suit.
 - f. Any other relief the court deems fit to grant.

2. It was pleaded that the Plaintiff is the Managing Director and Country Manager of DHL Kenya and was previously married to the 1st Defendant. He instituted a child maintenance and custody suit against



the 1st Defendant in Milimani Children Court Case No. 60 of 2017. It was the Plaintiff contention that the 1st Defendant caused false and malicious statements about him and the Children Case to be published by the 2nd and 3rd Defendants on a Twitter account called @itsMutai and a blog namely www.cnyakundi.com respectively as follows:

- “ a. Tweets on the 2nd Defendant’s Twitter handle @ItsMutai
- i. Published at 10.10 am on 25/6/2019:
- “Warrant of arrest is being issued against Andrew Mutuma, Country DHL Director for not obeying court orders in the children court of Nairobi. Court had issued orders requiring @amutuma to provide specified child support but he never obeyed. He is required to attend court tomorrow.”
- ii. Published at 11.20 am on 25/6/2019:
- “In a high profile case involving Country DHL Director Andrew Mutuma @amutuma where he has been accused by ex-wife of abducting their child, Children court in Nairobi has summoned him to appear in court in person on 26th June 2019 and produce the child or face warrant of arrest.”
- iii. Published at 8.25pm on 25/6/2019:
- “Andrew Mutuma had an ongoing court case in the children’s court in Nairobi. He has apparently refused to provide child care to a baby from his previous marriage. Enemies must now be exposed. From tomorrow I will do a series of tweets and blog posts on the case. Work in silence.”
- b. Articles on the 3rd Defendant’s blog <https://www.cnyakundi.com>
- i. “Country DHL Director AM Faces Arrest” published on 25/6/2019 at 1255 Hours, reads in part as follows:
- “In a high profile case involving Country DHL Director AM, he has been accused by the ex-wife of abducting their child. Children court in Nairobi has summoned him to appear in court in person on 26th June 2019 and produce the child or face Warrant of Arrest.
- The crooked boss has not been far from controversy and scandals as they always follow him.”



- ii. "Country DHL Director AM in Court" published on 27/6/2019 at 1142 Hours, reads in part as follows:

"Instead of handling his crisis like a man, mutuma has now dedicated the role of harassing his ex-wife to his crooked wife who has promised the ex-wife a big battle in Court. In a threatening message sent to the lady, and seen by the editor of this site, the current wife to the DHL boss seems unhappy with our blog posts and social media posts, despite the fact that we are just messengers."

- iii. "Besieged Country DHL Director AM Seeks To Gag Bloggers Nyakundi and Mutai in Ex-Wife's Saga" published on 5/7/2019 at 2201 Hours, reads in part as follows:

"Country DHL Director AM is fighting to gag the editor of this site and Blogger AM2 in a high profile case involving him and his wife, demand letters leaked to us can confirm.

Mr. AM, who has probably gone nuts with our coverage believes that his ex-wife is feeding us with information despite the fact that he has fucked up everybody, ranging from his DHL staffers to business partners, hence making it easier for us to get details pertaining his scams.

In a letter done by Ambulance chasing law firm Maina and Onsare Partners advocates, AM wants this site to stop covering his case, despite the fact that this is a public page that covers any matter of public interest and not meat wrapper Business Daily Africa where he can bribe journalists to write how he is a great leader despite many complaints from oppressed staffers at DHL.

Ambulance chasing law firms like Maina and Onsare Partners advocates have been making millions from desperate crooks like AM promising to solve their problems using courts of law further putting them into more embarrassing problems.

In the demand letter sent to his wife and sent to us by our sources, AM through Maina and Onsare Partners advocates wants the ex-wife to apologize through our platforms despite the fact that she doesn't own the platforms or the information posted there.

AM has also complained about Blogger AM2's tweets that he now wants to be deleted from Twitter despite



the fact that Mutai has the freedom to inform and educate his followers especially on matters of public interest...”

3. The Plaintiff averred that the 2nd and 3rd Defendants’ respective social media platforms are quite popular and thus it is obvious that the defamatory publications must have been accessed and consumed by many people.
4. The Plaintiff avers that the publications by the Defendants were defamatory in their natural and ordinary meanings and were understood to mean that:-
 - a. He is a morally corrupt man who is not fit to be the Country Manager of DHL Kenya or hold any other public office.
 - b. He is a careless parent and a criminal.
 - c. He is greedy and heartless.
 - d. He is a serial liar.
 - e. He conducts himself in an unprofessional manner.
 - f. He is untrustworthy.
5. The Plaintiff averred that the publications were designed to injure his reputation, standing and occupation as the Managing Director and Country Manager of DHL Kenya. He claimed that as a result of the libelous publications, his reputation, integrity and dignity amongst his colleagues and right-thinking members of the general public have been brought into scandal, odium, contempt and severely eroded. As a result, he has suffered great loss. Further, the Plaintiff averred that the publications were malicious as he was not afforded a right of reply or correction; they were made despite there being gag orders by the Children’s court; and, the Defendants refused to make any apologies on the falsehoods despite demands by the Plaintiff.
6. The 1st Defendant denied the claim through a Statement of Defence dated 20/8/2019 filed in court on 21/8/2019. She denied any knowledge of, relationship or communication with the 2nd and 3rd Defendants herein regarding the case before the Children Court or at all. She contended that it was possible that the 2nd and 3rd Defendants could have accessed the information through their own means because court documents are public. Further, the 1st Defendant averred that the meanings that the Plaintiff has attached to the articles are just but figments of his imaginations.
7. The 2nd and 3rd Defendants did not enter appearance or file defenses despite proper service of Summons. As such, interlocutory judgment was entered against them on 15/6/2021.

Evidence

8. Only the Plaintiff testified in support of his case as PW1. He adopted his witness statement dated 17/8/2021 as part of his evidence in chief and produced his lists and bundle of documents dated 8/7/2019 as well as supplementary list and bundle of documents dated 16/8/2021 as the exhibits in support of his case.
9. The Plaintiff testified that he is a former Managing Director of DHL - Kenya, and currently serves as a director of Maua Methodist Hospital. He asserted that the 1st Defendant was the only one who was aware of the ongoing court proceedings in the Children Court Case, leading him to believe that she was the source of the defamatory publications. The Plaintiff stated that there existed a gag order from the



Children's Court, dated 26/6/2019, as well as a separate order from the court instructing the 2nd and 3rd Defendants to pull down the publications. The Plaintiff further averred that he received inquiries about the publications from his former employer, the late Dr. Kirubi, as well as DHL's head office in Germany. Additionally, he stated that his daughter informed him about the damaging content she came across on social media, concerning him.

10. On cross-examination led by the advocate for the 2nd Defendant, PW1 acknowledged that the aforementioned publications were derived from social media, specifically electronic platforms and that no certificate of authentication had been adduced in that regard. He also admitted that no document has been presented to substantiate the claim that the 1st Defendant instructed the 2nd Defendant to publish the content in question. Moreover, PW1 confirmed that there are no existing warrants of arrest against the 2nd Defendant for contempt of court orders.
11. In re-examination, PW1 stated that none of the Defendants challenged the documents he presented. He reiterated that the 2nd and 3rd Defendants acted under the instructions of the 1st Defendant.

Analysis and Determination

12. The court has considered the pleadings, the evidence adduced by the Plaintiff, the parties' submissions and authorities cited. In the court's opinion the following are the issues that fall for determination:
 - a. Whether the Plaintiff has made out a case for defamation against the Defendants; and
 - b. Whether the Plaintiff is entitled to the reliefs sought.
13. According to Black's Law Dictionary, 9th Edition at page 479 defamation is defined as:

“The act of harming the reputation of another by making a false statement to a third person.”
14. Patrick O'Callaghan in The Common Law Series: The Law of Tort at paragraph 25.1 stated that the law of defamation is primarily concerned with the protection of a person's reputation and not his or her character.
15. The elements of defamation were outlined by the Court of Appeal in case of Selina Patani & another v Dhiranji V. Patani [2019] eKLR and Raphael Lukale v Elizabeth Mayabi & another [2018] eKLR as follows:
 - i. The statement must be defamatory.
 - ii. The statement must refer to the plaintiff.
 - iii. The statement must be published by the defendant.
 - iv. The statement must be false.
16. In the circumstances of this case, the court will begin by determining whether the Plaintiff has proved that the Defendants published the alleged defamatory statements. As pleaded and confirmed by the Plaintiff during cross-examination, the offending statements and/or articles were published on twitter and a blog. To prove this, the Plaintiff adduced computer screen shots and/or print outs of the same in evidence. These are electronic records whose admissibility is governed by the provisions of the [Evidence Act](#) Chapter 80 of the Laws of Kenya, which stipulates the requirements that must be met in order for such material to be considered valid evidence and to ensure their authenticity in a court of law.



17. Sections 78A of the [Evidence Act](#) provides as follows regarding admissibility of electronic and digital evidence:

- “(1) In any legal proceedings, electronic messages and digital material shall be admissible as evidence.
- (2) The court shall not deny admissibility of evidence under subsection (1) only on the ground that it is not in its original form.
- (3) In estimating the weight, if any, to be attached to electronic and digital evidence, under subsection (1), regard shall be had to—
 - a. the reliability of the manner in which the electronic and digital evidence was generated, stored or communicated;
 - b. the reliability of the manner in which the integrity of the electronic and digital evidence was maintained;
 - c. the manner in which the originator of the electronic and digital evidence was identified; and
 - d. any other relevant factor.
- 4) Electronic and digital evidence generated by a person in the ordinary course of business, or a copy or printout of or an extract from the electronic and digital evidence certified to be correct by a person in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self-regulatory organization or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract.”

18. Further, in order to be admissible in evidence, Section 106B of the [Evidence Act](#) stipulates as follows:

- “(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as "computer output") shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.
- (2) The conditions mentioned in subsection (1), in respect of a computer output, are the following—
 - a. the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;



- b. during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;
 - c. throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and
 - d. the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.
- (3) ...
- (4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following —
- a. identifying the electronic record containing the statement and describing the manner in which it was produced;
 - b. giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;
 - c. dealing with any matters to which conditions mentioned in subsection (2) relate; and
 - d. purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate),
- shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.”

19. The provisions of Section 106B have been addressed in several cases. The Court of Appeal in *County Assembly of Kisumu & 2 Others v Kisumu County Assembly Service Board & 6 Others* [2015] eKLR stated that:

“Section 106B of the [Evidence Act](#) states that electronic evidence of a computer recording or output is admissible in evidence as an original document “if the conditions mentioned in this section are satisfied in relation to the information and computer.” In our view, this is a mandatory requirement which was enacted for good reason. The court should not admit into evidence or rely on manipulated (and we all know this is possible) electronic evidence or record hence the stringent conditions to vouch for the authenticity and integrity of the electronic record sought to be produced...”

20. In the instant case, the computer print outs/ screen shots produced by the Plaintiff as proof of publication failed to pass the test of production of electronic evidence Section 106B of the [Evidence Act](#). This is because they were not accompanied by a Certificate of Electronic Record which is a mandatory



requirement. Counsel for the 2nd Defendant raised the issue on cross examination but the Plaintiff and/or his advocate did not deem it fit to seek leave to file the Certificate. In the premises, the court finds that the Plaintiff did not prove that the alleged publications were made by the 2nd and the 3rd Defendants on their social media platforms. He failed to discharge the legal burden of proof under Section 107(1) of the Evidence Act which stipulates that:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

21. Having made the above findings, the court deems it unnecessary to delve into determining whether the other ingredients of the tort of defamation have been established. The Plaintiff has failed to prove his case to the standard required in civil cases which is on a balance of probabilities.
22. Consequently, this suit is hereby dismissed with each party to bear own costs.

Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 25TH DAY OF JULY 2023.

JANET MULWA

JUDGE

